

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Range Technology Corporation) ASBCA No. 51943
)
Under Contract No. MDA908-97-C-0016)

APPEARANCE FOR THE APPELLANT: Duane Brummett, Esq.
Niceville, FL

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.
Acting Chief Trial Attorney
CPT Jennifer S. Zucker, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY
ON THE GOVERNMENT’S MOTIONS TO DISMISS WITH PREJUDICE

On 21 December 2000, and 24 June 2002, the Government filed motions to dismiss this appeal with prejudice because two of appellant’s principal witnesses asserted their Fifth Amendment rights and refused to give deposition testimony. Because the witnesses have now consented to testify, we deny the motions as moot.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTIONS

On 10 March 1997, the Government awarded Contract No. MDA908-97-C-0016 to appellant Range Technology Corporation in the amount of \$600,000.00. The contract required appellant to supply the Government one Bofors RBS-70 anti-aircraft missile defense system and deliver it to Redstone Arsenal, AL. (R4, tabs 1, 4) Appellant’s two primary officers were Mr. Chris Hanson, president, and Mr. Timothy D. Lacey, chief operating officer (R4, tabs 2, 8).

Appellant intended to purchase the missile system from a military general in Venezuela; however, delivery of the system was never made (R4, tab 2). Thus, by letter dated 30 January 1998, the Government terminated the contract for default. The letter stated that the Government was entitled to repayment of \$533,140, previously advanced to appellant. (R4, tab 67)

Following the commencement of this appeal, the Government sought to take the depositions of Messrs. Hanson and Lacey. (Gov’t mot. at tab 1) However, because of a concurrent criminal investigation related to the contract being conducted by the U.S. Department of Justice (DOJ), Messrs. Hanson and Lacey were advised by counsel not to

testify, and they asserted their Fifth Amendment right against self-incrimination. (Gov't mot. at tab 2)

On 21 December 2000, the Government filed a motion to dismiss the appeal with prejudice based upon the refusal of Messrs. Hanson and Lacey to testify, which was opposed by appellant. Thereafter, by a letter dated 25 January 2001, the Government expressed its willingness to agree to a stay and, following a telephone conference with the parties on 6 February 2001, the Board entered an Order Staying Further Proceedings. The stay was lifted by an Order entered 19 April 2002, at the Government's request, when it was informed that the DOJ was no longer pursuing the prosecution of appellant or its principals.

On 24 June 2002, the Government filed its second motion to dismiss the appeal with prejudice when Messrs. Hanson and Lacey continued to refuse to testify, even after the DOJ criminal proceedings had ended, asserting that it was unable to conduct full and complete discovery (Gov't mot.). Appellant filed an opposition, to which the Government responded.

In a letter dated 15 April 2003, written by the Government to appellant, a copy of which was provided to the Board, the Government stated that "[appellant's] witnesses recently agreed to cooperate with discovery and give sworn testimony in a deposition" The Government has not withdrawn either of its motions to dismiss.

DISCUSSION

The Government contended in both motions that the appeal should be dismissed with prejudice because appellant's two primary witnesses would not give deposition testimony, thus hampering the Government's discovery to the point that it could not fairly defend this appeal.

The Government has now provided the Board with a statement of its belief that the witnesses are willing to testify. Accordingly, the motions are moot.

DECISION

The Government's motions to dismiss with prejudice, filed 21 December 2000, and 24 June 2002, are denied as moot.

Dated: 23 June 2003

CAROL N. PARK-CONROY
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 51943, Appeal of Range Technology Corporation, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals